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No. 14-18-00600-CR

In the Court of Appeals
For the Fourteenth District of Texas
At Houston

No. 2130699
In County Criminal Court at Law Number Ten
Of Harris County, Texas

Phi Van Do
Appellant

v.

The State of Texas
Appellee

State's Appellate Brief

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Oral Argument Not Requested

Statement Regarding Oral Argument

The State does not request oral argument.

Identification of the Parties

Counsel for the State:

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Nicci Campbell and Dejean Cleggett
— Assistant District Attorneys at trial

Clint Morgan
— Assistant District Attorney on appeal

Appellant:

Phi Van Do

Counsel for the Appellant:

Ernest "Bo" Hopmann, III
— Counsel at trial

Alexander Bunin and Ted Wood
— Counsel on appeal

Trial Court

Dan J. Spjut
— Presiding judge

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Statement of the Case

The appellant was charged with driving while intoxicated. (CR 8). The information also alleged that an analysis of the appellant's breath showed an alcohol concentration greater than .15. (CR 8). He pleaded not guilty, but a jury found him guilty as charged. (2 RR 82-83; CR 93). The trial court treated the .15 allegation as a punishment enhancement and found it "true" before assessing punishment at one year's confinement in the county jail and a $250 fine. (4 RR 4-5; CR 94). The trial court suspended the period of confinement and ordered the appellant to serve one year's community supervision. (CR 94). The trial court certified the appellant's right of appeal and the appellant filed a notice of appeal. (CR 103, 107).

Statement of Facts

The appellant was driving and rear-ended a car that was stopped at a stoplight. (2 RR 106-08). An officer arrived at the scene and noticed the appellant smelled of alcohol and had slurred speech. (2 RR 123-24). The officer took the appellant into the station for further investigation, where the appellant did poorly on field sobriety tests, and blew a .194 on the Intoxylizer. (3 RR 18, 22, 62).

Summary of the Argument

The appellant raises five points of error. In his first point he complains that he was entitled to a grand jury indictment for this misdemeanor offense. The appellant's argument is foreclosed by Court of Criminal Appeals precedent, even though the appellant disagrees with that precedent.

In his second point the appellant complains that he doesn't know who the affiant is for the complaint in this case. This argument was forfeited when the appellant failed to raise it before trial.

In his third and fourth points the appellants complains about the trial court's failure to submit an aggravating element to the jury. The appellant treats this as a question of evidentiary sufficiency, but he is incorrect. A recent Court of Criminal Appeals case shows that this is jury charge error subject to a harm analysis. Looking at the circumstances of this case, the error was harmless beyond a reasonable doubt.

In his fifth point the appellant complains about conditions of community supervision. However, the appellant waived this complaint when he agreed to the conditions of community supervision in the trial court.

Reply to Point One

As he admits, the appellant's argument is counter to binding precedent from the Court of Criminal Appeals.

In his first point, the appellant claims he was entitled to a grand jury indictment on this misdemeanor because the punishment options included both a fine *and* confinement, and under the state constitution the only offenses immune from the grand jury requirement are those for which the punishment is "fine *or* imprisonment, otherwise than in the penitentiary." As the appellant admits, this argument was rejected by the Court of Criminal Appeals in 1947, and this Court is bound by that precedent. (*See* Appellant's Brief at 27-32 (criticizing *Peterson v. State*, 204 S.W.2d 618 (Tex. Crim. App. 1947), but admitting this Court is bound by it and he must litigate this matter on discretionary review)).

This Court should summarily reject the appellant's complaint and let him take this up with the Court of Criminal Appeals if he chooses. *See Peterson*, 204 S.W.2d at 618 ("All courts have acted upon the assumption this was proper. We think they have been right and are, therefore, unable to give effect to the distinction which appellant seeks to make.").

Even if the appellant was correct, the failure to obtain a valid waiver of a grand jury indictment would not warrant reversal.

The right to a grand jury indictment is a personal right that can be waived. *King v. State*, 473 S.W.2d 43, 51 (Tex. Crim. App. 1971). The Code of Criminal Procedure authorizes defendants to waive the right to a grand jury indictment for any offense other than a capital felony. TEX. CODE CRIM. PROC. art. 1.141. If a case that should be tried on an indictment is improperly tried on an information and the record does not show that the defendant affirmatively waived his right to a grand jury indictment, this is not a constitutional or jurisdictional issue. *Ex parte Long*, 910 S.W.2d 485, 486 (Tex. Crim. App. 1995).

When a defendant complains of a procedural, non-constitutional error, an appellate court must disregard the error unless it affected his substantial rights. TEX. R. APP. P. 44.2(b). In this case, a jury found the evidence of the appellant's guilt beyond a reasonable doubt. In such a case, "grand jury review would have provided [the appellant] with no clear benefit." *Vasquez v. State*, 272 S.W.3d 667, 673 (Tex. App.—Eastland 2008, no pet.) (error, if any, in not getting amended indictment approved by grand jury would not warrant reversal in case where evidence was sufficient to support conviction.).

Reply to Point Two

The appellant forfeited his complaint by not raising it prior to trial.

In his second point, the appellant complains about the signature on the information because he does not know who "A.H." is, and perhaps he or she isn't a credible person. (Appellant's Brief at 33-36).

A defect in a complaint is not jurisdictional, so it must be raised as a challenge to the information. *Ramirez v. State*, 105 S.W.3d 628, 629 (Tex. Crim. App. 2003). Any complaint about a defect in an information is forfeited if not raised prior to trial. TEX. CODE CRIM. PROC. art. 1.14(b). The appellant did not raise this prior to trial.

This case illustrates the importance of raising complaints prior to trial. In the trial court, there could have been a hearing for the appellant to learn who "A.H." is, and whether he or she is a credible person. Instead, the appellant now presents this court with a silent record and asks for a reversal based on speculation. This Court should reject his claim.

Reply to Points Three and Four.

The trial court's failure to submit the .15 element to the jury was jury charge error subject to a harm analysis. The error does not warrant reversal because, after examining the record, is apparent the jury's verdict of guilt encompassed a positive finding on the .15 element.

When a defendant is charged with the Class A misdemeanor of DWI with an alcohol concentration of .15 or greater, the issue of whether the defendant's alcohol concentration was .15 or greater is an essential element of the offense that must be proved to the jury at the guilt phase of trial. *Navarro v. State*, 469 S.W.3d 687, 696 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd).

That procedure was not followed in this case. Instead, the jury was charged on regular Class B DWI, and the trial court and prosecutor treated the issue as a punishment enhancement for the trial court to find during the punishment phase. (CR 89-91; 4 RR 4-5).

In his third point, the appellant treats this as a matter of evidentiary sufficiency and asks for this Court to reform the judgement to reflect a conviction for Class B DWI. (Appellant's Brief at 43-45). But the evidence at the guilt phase of this trial was plainly sufficient to show that the appellant's alcohol concentration was greater than .15. (*See* 3 RR 62; State's Ex. 5); *cf. Navarro*, 469 S.W.3d at 697-98 (evi-

dence insufficient to support .15 element not because element was treated as punishment enhancement, but because test results showed BAC less than .15). In his fourth point, the appellant treats this as violation of his federal constitutional right to have a jury determine all the elements of the offense.

The error in this case was not the State's failure to prove its allegation, but rather the trial court's failure to submit all the elements of the charged offense to the jury during the guilt phase. The Court of Criminal Appeals recently dealt with a nearly identical situation in *Niles v. State*, 555 S.W.3d 562 (Tex. Crim. App. 2018). Niles was charged with terroristic threat, which is normally a Class B misdemeanor, but the State alleged that the offense was committed against a public servant, which elevated it to a Class A. *Niles*, 555 S.W.3d at 564. Although the State's evidence showed that the complainant was a public servant, the jury charge did not include the aggravating element and asked the jury only whether Niles was guilty of the Class B offense. The trial court entered a judgement of guilty on a Class A offense.

On direct appeal, this Court, without conducting a harm analysis, reformed the judgements to reflect a conviction for Class B offenses. *Niles v. State*, No. 14-15-00498-CR, 2016 WL 7108248, at *10

(Tex. App.—Houston [14th Dist.] Dec. 6, 2016) (mem. op. not designated for publication).

On discretionary review, the Court of Criminal Appeals held that the failure to submit an aggravating element to the jury was subject to a harm analysis. *Niles*, 555 S.W.3d at 572-73. It cited to numerous federal and state cases where courts had conducted such harm analyses. *Id.* at 572. It then remanded the case to this Court for a harm analysis, where the case (at the time of this writing) is still pending.

Because the failure to submit an element to the jury is constitutional, such error requires reversal unless it is harmless beyond a reasonable doubt. *People v. Mountjoy*, 431 P.3d 631, 635 (Colo. App. 2016) (collecting state and federal cases so holding); TEX. R. APP. P. 44.2(a). Based on the state of the evidence, the arguments of the parties, and the nature of the omitted instruction, the State believes the error in this case was harmless because the verdict shows that the jury believed the breath test results.

Other than the breath test, the State's evidence of intoxication in this case was weak. The driver and passenger of the car the appellant hit testified that he smelled of alcohol, but otherwise did not describe any signs of intoxication. The officer who detained the appellant testi-

fied that the appellant smelled of alcohol and had slurred speech, but otherwise did not believe he had probable cause to believe the appellant was intoxicated. A civilian witness — not the officer who conducted the sobriety tests — testified that the appellant "failed" the one-leg-stand test, though he did not explain what that meant, and that the appellant had shown seven of eight clues of intoxication on the walk-and-turn test.

And that was it. There was no testimony of the appellant being incoherent or unable to walk. In the video of the appellant's sobriety tests, he holds a discussion with the civilian witness without appearing obviously drunk. In the face of this marginal evidence of intoxication, the jury's determination of guilt was surely based on the breath tests results, which were well outside the legal limit. Put another way: If the jury had disbelieved the test result, it would have acquitted.

The defense in this case was two pronged. The main part of defense counsel's argument that the appellant's arrest was illegal, and all the evidence obtained after the arrest (including the breath test) should be disregarded as illegally obtained evidence. (3 RR 78-84). During the argument, defense counsel also seemed to claim that, based on how cogent and sober the appellant appeared on the video, the ap-

pellant was not intoxicated. (3 RR 81-82 ("Y'all heard him talking to the officers and his speech wasn't slurred.... You don't get a [.19] or [.20] and then have somebody evidence clear speech. That's an undisputable conflict.")

Other than pointing out the incongruity between the score and the appellant's appearance, defense counsel did not attack the validity of the test. Defense counsel's cross-examination of the breath test operator focused on discrediting the sobriety field test results. (3 RR 29-43). Defense counsel's brief cross-examination of the technical supervisor for the Intoxilyzer covered a variety of topics and did not focus on the test's validity. (3 RR 65-71). Nothing in the State's closing argument evinces a belief that the test results had been seriously undermined. (*See* 3 RR 84-89).

Had the jury disbelieved the test results, that would have been because they bought the defense's theory that the defendant was not intoxicated and the test was inaccurate. The jury's finding of guilt is a finding it believed the test result.

Finally, the nature of the .15 finding should be considered. It only comes into play once a jury has found a defendant intoxicated, but once the jury has made that determination the .15 element is quite

possibly the single most objective element of any offense in the Penal Code. There is no interpretation or extrapolation needed. The only question is: When the defendant took the breath or blood test, was the number .15 or above? It was and the appellant never argued otherwise. The jury's finding of intoxication renders a positive finding on the .15 element a foregone conclusion.

In this case, given the nature of the evidence, the arguments of the parties, and the nature of the omitted element, the "missing element was logically encompassed by the guilty verdict." *See Niles*, 555 S.W.3d at 572. The trial court's error in omitting the element was harmless beyond a reasonable doubt and this Court should reject the appellant's third and fourth points.

Reply to Point Five

The appellant affirmatively waived any objection to the complained-of conditions of community supervision. If he believes his conditions are illegal, he can bring that matter to the trial court's attention without this Court's involvement.

In his fifth point of error, the appellant complains about several conditions of his community supervision. (Appellant's Brief at 49-58). However, he did not object to these matters in the trial court when he had the chance. *See* (CR 98 (appellant's and judge's signature on con-

ditions of community supervision)); *Donovan v. State*, 508 S.W.3d 351, 355 (Tex. App.—Fort Worth 2014) *aff'd* No. PD-0474-14, 2015 WL 4040599 (Tex. Crim. App. July 1, 2015) (defendant's and judge's signature on conditions of community supervision shows defendant had opportunity to complain).

When a defendant accepts the conditions of his community supervision, he affirmatively waives any objection he has to those conditions and may not complain of them on appeal. *Speth v. State*, 6 S.W.3d 530, 534 (Tex. Crim. App. 1999). This Court should reject the appellant's fifth point as waived.

If this Court is concerned that the trial court's conditions are illegal, it is worth noting that appeal to this Court in this case is not only an inappropriate remedy, it's an inefficient one as well. The appellant's community supervision expires on June 18, 2019. This Court is quite unlikely to have rendered an opinion by that point in time. (CR 98). If this Court granted the appellant his requested relief (remand for a hearing regarding his ability to pay costs), it would be moot by that point in time.

If he chooses, however, the appellant can at any point in time file a motion in the trial court to modify the conditions of his supervision;

if that is unsuccessful, he could then apply for a writ of habeas corpus and receive expedited treatment in this Court. *See* TEX. CODE CRIM. PROC. art. 11.072(3)(b). Indeed, had he done so instead of invoking the ponderous process of direct appeal, he likely would have had a result well before this case is submitted.

The record is silent as to whether the trial court made the inquiry the appellant claims was required.

The appellant attempts to get around *Speth's* requirement of a trial court objection by claiming that because statutes say the trial court "shall" inquire into the defendant's ability to pay a fine, that this is a systemic requirement that does not require a trial court objection before it can be raised on appeal. (*See* Appellant's Brief at 52-55) (citing TEX. CODE CRIM. PROC. arts. 42.15, 42A.301 and *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993)).

What the appellant misses in this analysis is that the record is silent as to whether the trial court actually conducted the inquiry that he says is required. Nothing in the statutes requires this inquiry to be on the record, and the appellant does not cite to any authority requiring the inquiry to be on the record. Due to his failure to raise this complaint in the trial court, the appellant has presented this Court with a

silent record that is silent as to whether the complained-of statutory violation even occurred.

Conclusion

The State asks this Court to affirm the trial court's judgment.

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